101ST CONGRESS
2d Session

SENATE

EXEC. REPORT
101-30

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

AUGUST 30, 1990.—Ordered to be printed

Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany Treaty Doc. 100-20]

The Committee on Foreign Relations to which was referred the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988, having considered the same, reports favorably thereon with three reservations, eight understandings, and two declarations, and recommends that the Senate give its advice and consent to ratification thereof.

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PURPOSE

The Convention establishes a regime for international cooperation in the criminal prosecution of torturers relying on the principle of "universal jurisdiction" and on the obligation to extradite or prosecute. Each State Party is bound to establish criminal jurisdiction over torture and to prosecute torturers who are found in its territory or to extradite them to other countries for prosecution. The Convention also obligates States Parties to include acts of torture as extraditable offenses in treaties concluded between them.

States Parties are obligated to take legislative, administrative, judicial, or other measures to prevent acts of torture in territories under their jurisdiction. The Convention also requires States Parties to undertake to prevent acts of cruel, inhuman, or degrading treatment or punishment in their territories.

The Convention establishes a Committee Against Torture to monitor compliance and to investigate allegations of the use of torture.

BACKGROUND

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment was adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and entered into force on June 26, 1987. As of August 1 of this year, 52 States had become Party to the Convention and 21 others had signed.

The United States signed the Convention on April 18, 1988. President Reagan transmitted the Convention to the Senate on May 20, 1988, with several proposed U.S. conditions. In a letter of May 8, 1989 to Senator Pell, the chairman of the Foreign Relations Committee, the Bush administration designated the Convention Against Torture as one for which there is an "urgent need for Senate approval." In January 1990, the Bush administration submitted a revised and reduced list of proposed U.S. conditions.

Adoption of the Convention in 1984 culminated more than a decade of efforts at the international level to eliminate the practice of torture. In 1973 the U.N. General Assembly adopted Resolution 3059 rejecting "any form of torture and other cruel, inhuman or degrading treatment or punishment." Two years later, it adopted the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2 of the declaration states that "any act of torture or other cruel, inhuman or degrading treatment or punishment is an offense to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights." Article 3 states that "no State may permit or tolerate torture or other cruel, inhuman or degrading treatment or punishment." The declaration served as the foundation for the Convention.

The Convention itself was the product of 7 years of intense negotiations, in which the United States played an active part. The United States helped to focus the Convention on torture rather

than other less abhorrent practices and to strengthen the effectiveness of the Convention by pressing for provisions that would ensure that torture is a punishable offense. Congress demonstrated its support for these activities in 1984 through passage of a joint resolution, sponsored by Senators Pell and Percy, reaffirming the U.S. Government's opposition to torture and commitment to combat the practice of torture and expressing support for the involvement of the U.S. Government in the formulation of international standards and effective implementing mechanisms against torture.

Committee Action

On January 30, 1990, the Committee on Foreign Relations held a public hearing on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Testimony was heard from two administration witnesses, Abraham D. Sofaer, Legal Adviser, Department of State, and Mark Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice. The following public witnesses also presented testimony: Winston Nagan, Chairman, Board of Directors, Amnesty International USA; David Forte, Professor of Law, Cleveland State University; James Silkenat, Chairman, Section of International Law and Practice, American Bar Association; Charles Rice, Professor of Law, Notre Dame Law School; and David Weissbrodt, Briggs and Morgan Professor of Law, University of Minnesota, and Center for Victims of Torture, the Minnesota Lawyers International Human Rights Committee.

The committee met to consider the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on July 19, 1990. The committee voted 10 to 0 to report favorably the Convention with a resolution of ratification to the Senate for its advice and consent. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, and Robb.

The resolution of ratification reported by the committee contains the reservations, understandings, and declarations submitted by the Bush administration.

Committee Comments

The committee regards the Convention Against Torture as a major step forward in the international community's efforts to eliminate torture and other cruel, inhuman or degrading treatment or punishment. The Convention codifies international law as it has evolved, particularly in the 1970's, on the subject of torture and takes a comprehensive approach to the problem of combating torture. The strength of the Convention lies in the obligation of States Parties to make torture a crime and to prosecute or extradite alleged torturers found in their territory.

Ratification of the Convention Against Torture will demonstrate clearly and unequivocally U.S. opposition to torture and U.S. determination to take steps to eradicate it. Ratification is a natural follow-on to the active role that the United States played in the negotiating process for the Convention and is consistent with longstanding U.S. efforts to promote and protect basic human rights and fundamental freedoms throughout the world. As a party to the

Convention, the United States will be in a stronger position to prosecute alleged torturers and to bring to task those countries in the international arena that continue to engage in this heinous and inhumane practice.

The committee appreciates the efforts of the present administration to address the concerns raised by the human rights community and others, including members of this committee, about the reservations, understandings and declarations submitted by the Reagan administration. Those conditions, in number and substance, created the impression that the United States was not serious in its commitment to end torture worldwide. The conditions proposed by the present administration in large measure eliminate this problem.

The reservations, understandings, and declarations proposed by the Bush administration, which are incorporated in the resolution of advice and consent to ratification, are the product of a cooperative and successful negotiating process between the executive branch, this committee, and interested private groups. The committee has adopted these conditions with the understanding that they reflect a broad consensus and with the strong belief that they resolve fully any potential conflicts between the Convention and U.S. law.

During the course of the committee's hearing on the Convention and in subsequent correspondence between various members of the committee and the administration, several issues were raised. Three of these deserve comment because they relate directly to the basic goal of this Convention, to eliminate the practice of torture, and to the ability of the United States to lead the international community in the attainment of this goal.

The first relates to constitutional protections, specifically whether a reservation is necessary in the instrument of ratification to ensure that ratification of the Convention does not bind the United States to take actions prohibited by the Constitution. The administration opposes the so-called constitutional reservation on the grounds that it is "unnecessary" at the domestic level and "damaging" at the international level. A majority of the committee shares this view.

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert,* 354 U.S. 1, 17 (1957). As a matter of domestic law, the Constitution necessarily circumscribes the Government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the Convention whether or not a "constitutional" reservation were included in the instrument of ratification.

The Convention Against Torture does not and could not require the United States to take any legislative or other action prohibited by the Constitution. Therefore, a constitutional reservation would add nothing in the way of constitutional protection. However, such a reservation could create numerous problems at the international level.

It could raise questions as to the exact nature of the treaty obligations undertaken by the United States. Moreover, under international treaty law, it automatically becomes available to all other

States. Although the U.S. Constitution provides no justification for torture, other States could limit their compliance with the Convention by invoking the terms of their own constitutions, which may be vague or easily altered. The cornerstone of the regime established by the Convention is the obligation to prosecute or extradite alleged torturers. This obligation could be altered or even negated through reciprocal constitutional reservations. In such circumstances, the Convention's absolute prohibition on torture would be severely undermined.

The inclusion of a constitutional proviso in the U.S. instruments of ratification for the International Convention on the Prevention and Punishment of the Crime of Genocide and, more recently, on six Mutual Legal Assistance Treaties (MLAT's) has turned out to be problematic. In the case of the Genocide Convention, 12 Western European nations have filed written objections to the reservation and others have indicated their intention to oppose a similar reservation if taken on the Convention Against Torture. With respect to the MLAT's, four of the six States involved have voiced strong concerns about the proviso and/or have taken similar reciprocal provisos. Presumably, the reaction would be the same to a constitutional proviso with respect to the Convention Against Torture. In the case of a multilateral treaty, the adverse consequences of such reservations and objections to them are magnified.

The second issue is whether the United States should accept the competence of the Committee Against Torture. Established by the Convention as a monitoring mechanism, the committee consists of 10 experts with recognized competence in the field of human rights who have been nominated and elected by States Parties to the Convention. The committee has competence to investigate reports of the use of torture, to consider complaints from one State Party that another State Party is failing to comply with the Convention, and to consider complaints from individuals against a State Party. The committee's decisions are nonbinding.

During the negotiating process, the United States, under the Reagan administration, attached great importance to the inclusion of adequate implementation provisions and regarded the committee as a "well-conceived, adequately circumscribed scheme" containing the "minimal elements necessary for assuring effective control over compliance with the convention." Regrettably, the Reagan administration reversed itself on this important is sue when it submitted the Convention to the Senate with a reservation stating that the committee's competence would not be recognized by the United States. The formulation proposed by the present administration, that is to recognize the first two aspects of the committee's competence, is a significant improvement. Participation will allow the United States to seek to concentrate the committee's work on situations where the problem of torture is most serious. On the other hand, refusal to recognize the committee's competence would send the wrong signal about the seriousness of the U.S. commitment to eliminate torture and undermine our ability to call another State's actions into question.

The third issue relates to the criteria for determining the meaning of the term "lawful sanctions" in the definition of "torture" in Article 1 of the Convention. The definition excludes pain or suffer-

ing caused as a result of "lawful sanctions." A majority of the committee agrees with the administration's position that the term should be defined with reference to both domestic and international law and therefore has included the administration's proposed understanding on this matter in the resolution of ratification. It is imperative that other States Parties be prevented from using the "lawful sanctions" exemption to justify actions which are clearly torture by declaring them lawful under domestic law.

Major Provisions

1. DEFINITION OF "TORTURE"

The Convention makes a distinction between "torture" and "other acts of cruel, inhuman or degrading treatment or punishment." As defined in the Convention, "torture" is:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person * * * when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Convention's definition is more specific and comprehensive than definitions of "torture" in other human rights treaties. The inclusion of "mental" pain and suffering in the definition reflects the increasing use by many countries of psychological forms of torture.

The Convention does not categorize the acts that constitute torture but rather provides criteria by which to determine if an act is torture. For an act to be "torture," it must be an extreme form of cruel and inhuman treatment, cause severe pain and suffering, and be intended to cause severe pain and suffering. The Convention deals only with torture committed in the context of governmental authority; acts of torture committed by private individuals are excluded.

2. EFFECTIVE MEASURES TO PREVENT ACTS OF TORTURE

The Convention obligates each State Party to take "effective legislative, administrative, judicial or other measures" to prevent acts of torture in any territory under its jurisdiction.

3. UNIVERSAL JURISDICTION/EXTRADITION

The Convention establishes a regime for international cooperation in the criminal prosecution of torturers based on the principle of "universal jurisdiction" and on the obligation to extradite or prosecute. Each State Party to the Convention has an obligation to establish criminal jurisdiction to prosecute alleged torturers who are found in its territory or to extradite them to other countries for prosecution. The Convention obligates States Parties to include acts of torture as extraditable offenses in treaties concluded between them.

4. WAR/SUPERIOR ORDERS

The Convention specifies that "no exceptional circumstances," including war, internal political instability, other public emergencies, or orders from a superior officer or public authorities, may be invoked as a justification for torture.

5. NONREFOULEMENT

States Parties have an obligation not to expel, return ("refouler") or extradite a person to another State where there are "substantial grounds" for believing that the individual would be tortured.

6. EDUCATION AND TRAINING

The Convention requires each State Party to ensure that education and information regarding prohibitions against torture be included in the training of law enforcement officers and other relevant personnel and public officials.

7. CIVIL REDRESS

States Parties to the Convention are required to provide a victim of torture with a legal redress and an enforceable right to fair and adequate compensation. Victims, therefore, can sue for damages the authorities responsible for the acts of the torturer.

8. CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The Convention requires States Parties to "undertake to prevent" other acts of "cruel, inhuman or degrading treatment or punishment which do not amount to torture" in territories under their jurisdiction. Such acts must be committed by an individual acting in an official capacity.

9. COMMITTEE AGAINST TORTURE

The Convention establishes a Committee Against Torture composed of 10 experts in the human rights field, nominated and elected by the States Parties. The committee has the authority to receive compliance reports from the States Parties and the competence to investigate allegations of the use of torture by one State Party against another and by individuals against a State Party and to initiate contact with a State Party and conduct a confidential inquiry when there is reliable evidence that torture is being practiced in that State's territory. States Parties to the Convention must specifically recognize the competence of the committee to receive and consider complaints from other States Parties or from individuals. States Parties may decline to recognize the committee's competence to conduct an investigation in the absence of a formal complaint.

Bush Administration Conditions

The Reagan administration transmitted the Convention to the Senate in May 1988 with 17 separate conditions (4 reservations, 9 understandings, and 4 declarations). The Bush administration reviewed these proposals in response to congressional and public concern about their impact on the international community's effort to

eliminate torture. The product of this review was a reduced and revised package of proposed conditions to be incorporated in the instrument of ratification. Following is a summary of the conditions proposed by the Bush administration.

RESERVATIONS

1. Federal-State

The Convention (Articles 10–14, 16) obligates States Parties to provide education and training to law enforcement personnel, review law enforcement procedures, investigate allegations of torture, provide civil redress in cases of torture, and prevent other cruel, inhuman or degrading treatment or punishment not amounting to torture. Because of the decentralized distribution of police and other governmental authority at Federal, State, and local levels, the administration proposed a Federal-State reservation.

This reservation states that the Federal Government will fulfill the U.S. obligation where it exercises legislative and judicial jurisdiction and that it will take appropriate measures to ensure that States and localities take steps to fulfill the provisions of the Convention. This reservation would not exempt State or local officials from the prohibitions against torture in the Convention.

2. Article 16—Cruel, Inhuman or Degrading Treatment or Punishment

Article 16 of the Convention obligates States Parties to prevent acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture from being practiced on their territories. The administration proposed a reservation limiting its obligation under this article to cruel, unusual, and inhumane treatment or punishment prohibited by the 5th, 8th, and/or 14th amendments to the Constitution.

The administration takes the position that the reference in article 16 to "cruel" and "inhuman" treatment or punishment appears to be roughly equivalent to the treatment or punishment barred in the United States by the 5th, 8th, and/or 14th amendments to the Constitution. However, "degrading" treatment or punishment has been interpreted, for example by the European Commission on Human Rights, to include treatment that would probably not be prohibited by the U.S. Constitution and may not be illegal in the United States. In view of the ambiguity of the terms, the administration believes that U.S. obligations under this article should be limited to conduct prohibited by the U.S. Constitution.

3. Article 30—International Court of Justice

Article 30, Paragraph 1, of the Convention provides for submission of a dispute which cannot be settled by arbitration to the International Court of Justice; paragraph 2 permits a State party to reserve itself from the obligation under paragraph 1 at the time of signature, ratification, or accession. Asserting its policy of not accepting the compulsory jurisdiction of the International Court of Justice, the administration proposed a reservation exercising the option under paragraph 2 of Article 30 of the Convention.

UNDERSTANDINGS

1. Article 1—Definition of "Torture"

Article 1 of the Convention defines "torture" as follows:

> * * * any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person * * * when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.

2. Article 1

The administration proposed the following understandings with respect to article 1:

> a. The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

The above language represents a revision of the Reagan administration's proposed understanding, which was criticized for setting too high a threshold of pain for an act to constitute torture.

b. The second understanding states that the definition of "torture" in article 1 is intended to apply "only to acts directed against persons in the offender's custody or physical control." This understanding is designed to clarify the relationship of the Convention to normal military and law enforcement operations.

c. The third understanding states that the term "sanctions" in article 1 includes judicially imposed sanctions and other enforcement actions authorized by U.S. law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law." The Reagan administration's language has been revised to make it clear that to be "lawful," sanctions must also meet the standards of international law.

d. The fourth understanding states that the public official, "prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity." The purpose of this condition is to make it clear that both actual knowledge and "willful blindness" fall within the definition of the term "acquiescence" in article 1.

e. In order to guard against the improper application of the Convention to legitimate U.S. law enforcement actions, the administration proposed an understanding that noncompliance with applicable legal procedural standards does not *per se* constitute "torture."

3. Article 3—Non-Refoulement

Article 3 forbids a State Party from forcibly returning a person to a country where there are "substantial grounds for believing that he would be in danger of being subjected to torture."

Under U.S. immigration law, the United States can not deport an individual if "it is more likely than not that the alien would be subject to persecution." *INS* v. *Stevic*, 467 U.S. 407 (1984). U.S. immigration law also provides that asylum may be granted to an alien who is unwilling to return to his home country "because of persecution or a well-founded fear of persecution * * *" *INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987).

The administration's proposed understanding adopts the more stringent *Stevic* standard because the administration regards the nonrefoulement prohibition of article 3 as analogous to mandatory withholding of deportation. Therefore, article 3 would apply when it is "more likely than not" that the individual would be tortured upon return.

4. Article 14—Compensation

Article 14 requires each State Party to ensure that victims of torture or their surviving relative(s) have the right to redress and adequate compensation. The negotiating history of the Convention indicates that article 14 requires a State Party to provide this right of action for damages only for acts of torture committed in its territory. The administration proposed an understanding which reflects the intent of the negotiating parties.

5. Death Penalty

The administration proposed an understanding stating that international law does not prohibit the death penalty and that the United States does not consider the Convention to restrict or prohibit the use of the death penalty, including the confinement prior to imposition of sentence. This understanding is designed to clarify that ratification of the Convention will not alter U.S. law regarding the death penalty issue.

DECLARATIONS

1. Non-Self-Executing Articles

The administration proposed a declaration that the Convention is not self-executing for articles 1 through 16. Since the majority of the obligations to be undertaken by the United States pursuant to the Convention are already covered by existing law, additional implementing legislation will be needed only with respect to article 5, dealing with areas of criminal jurisdiction. The effect of the proposed declaration is to clarify that further implementation of the Convention will be through implementing legislation. In keeping with past practice, upon enactment of this legislation, the President will deposit the instrument of ratification.

2. Article 21—Committee Against Torture

The administration's proposed declaration recognizes the competence of the Committee Against Torture to investigate complaints from one State Party that another is not fulfilling its obligations

under the Convention. This declaration will enable the United States to bring formal complaints against other States Parties allegedly violating the Convention.

Summary and Analysis

The following summary and technical analysis of the Convention was submitted by the Reagan administration at the time of transmittal of the Convention to the Senate on May 20, 1988. The Bush administration has omitted and revised some of the proposed conditions referred to in this submission, as indicated in appendix A.

Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

GENERAL BACKGROUND

Among the antecedents of the Convention are the laws of war. The 1907 Hague Convention on the Laws and Customs of War on Land provides that prisoners of war "must be humanely treated" and that inhabitants of occupied territories generally may not be forced "to furnish information about the army of the other belligerent, or about its means of defense" or compelled "to swear ally glance to the hostile Power." (Annex, "Regulations Respecting the Laws and Customs of War on Land," Articles 4, 44, and 45.) The Third and Fourth Geneva Conventions of 1949, to which virtually all countries are parties, forbid "any form of torture or cruelty" toward prisoners of war and prohibit the use of "physical or moral coercion * * * against protected persons, in particular to obtain information from them or from third parties" as well as "taking any measure of such a character as to cause the physical suffering, or extermination of protected persons * * *", including "brutality" as well as "murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person. * * *" (Third Convention, Article 87; Fourth Convention, Articles 31 and 32.)

With the development of more general human rights instruments, the prohibition of torture and inhuman treatment or punishment has been established as a standard for the protection of all persons, in time of peace as well as war. The first major United Nations document on human rights, the 1948 Universal Declaration of Human Rights, provides in Article 5:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Subsequently, the International Covenant on Civil and Political Rights was developed, which elaborated binding treaty obligations with respect to a broad range of civil and political rights. This treaty, which was opened for signature in 1966, is now in force for some 80 countries (but not for the United States, which has signed but not ratified it). It provides in Article 7:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 4 further provides that no derogation can be made from this provision, even in time of public emergency.

Prohibitions against torture are also contained in the regional human rights conventions. American Convention on Human Rights, Article 5(2) (OAS Treaty Series No. 36) (the United States has signed, but not ratified, this Convention); European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 3 (213 U.N.T.S. 221); African Charter on Human and Peoples' Rights, Article 5 (ASIL Int'l Legal Mat., Jan. 1981, p. 58).

A later instrument, which sets forth more detailed non-binding "guidelines" with respect to torture and other cruel, inhuman or degrading treatment or punishment, is the "Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment," adopted by the United Nations General Assembly without a vote on December 9, 1975. A/Res/3452 (XXX). This declaration, which contains 12 articles defining torture and setting forth recommended measures for its prevention and punishment, was a point of departure for the drafting of the Convention Against Torture.

The Convention is also modeled after four earlier multilateral conventions against terrorist acts, to each of which the United States is a party: the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking) (TIAS 7192; 22 UST 1641); the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) (TIAS 7570; 24 UST 564); the 1973 United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (protection of Diplomats) (TIAS 8532; 28 UST 1975); and the 1979 International Convention Against the Taking of Hostages (Hostages) (U.N.G.A. Res. 34/46, December 17, 1979; Senate Ex. N, 96th Cong., 2d Sess. (1980)). Each of these conventions establishes a regime for international cooperation in the criminal prosecution of persons committing the specific offense covered, relying particularly on stalled "universal jurisdiction"—the obligation of each State Party to establish criminal jurisdiction to prosecute offenders who are found in its territory—and on the obligation to extradite offenders or submit their cases for prosecution.

DECLARATION REGARDING THE NON-SELF-EXECUTING NATURE OF THE CONVENTION

Although the terms of the Convention, with the suggested reservations and understandings, are consonant with U.S. law, it is nevertheless preferable to leave any further implementation that may be desired to the domestic legislative and judicial process. The following declaration is therefore recommended, to clarify that the provisions of the Convention would not of themselves become effective as domestic law:

> "The United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."

FEDERAL-STATE RESERVATION

Given the decentralized distribution of police and other governmental authority at federal, state and local levels, it is desirable to make the following federal-state reservation:

"The United States shall implement the Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention."

This reservation would relate primarily to the obligations contained in Articles 10–14 and 16 of the Convention relating to training of law enforcement personnel, review of law enforcement procedures, investigation of allegations of torture, and complaints and civil suits alleging torture. it would not exclude state or local officials from the prohibitions on torture contained in the Convention.

ARTICLE 1

Article 1 defines "torture" for purposes of the Convention. The Convention seeks to define "torture" in a relatively limited fashion, corresponding to the common understanding of torture as an extreme practice which is universally condemned. "Torture" is thus to be distinguished from lesser forms of cruel, inhuman, or degrading treatment or punishment, which are to be deplored and prevented, but are not so universally and categorically condemned as to warrant the severe legal consequences that the Convention provides in the case of torture.

The Convention does not attempt to catalog the various acts that constitute torture, nor was it thought possible to draw a precise line between torture and lesser forms of cruel, inhuman or degrading treatment or punishment. Rather, the Convention sets forth certain criteria which must be applied in determining whether a given act amounts to torture. For an act to constitute torture, it must be an extreme form of cruel and inhuman treatment, it must cause severe pain and suffering, and it must be intended to cause severe pain and suffering.

The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to "other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture.* * * *" The negotiating history indicates that the underlined portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.

The extreme nature of torture is further emphasized in the requirement that torture cause *severe* pain and suffering. Article 1 recognizes that severe pain and suffering may be mental as well as physical. Mental pain and suffering is, however, a relatively more subjective phenomenon than physical suffering. Accordingly, in determining when mental pain and suffering is of such severity as to constitute torture, it is important to look to other, more objective criteria such as the degree of cruelty or inhumanity of the conduct causing the pain and suffering.

Further, the requirement of intent to cause severe pain and suffering is of particular importance in the case of alleged mental

pain and suffering, as well as in cases where unexpectedly severe physical suffering is caused. Because specific intent is required, an act that results in unanticipated and unintended severity of pain and suffering is not torture for purposes of this Convention. The requirement of intent is emphasized in Article 1 by reference to illustrate motives for torture: obtaining information of a confession, intimidation and coercion, or any reason based on discrimination of any kind. The purposes given are not exhaustive, as is indicated by the phrasing "for such purposes as." Rather, they indicate the type of motivation that typically underlies torture, and emphasize the requirement for deliberate intention or malice.

In view of the above, such rough treatment as generally falls into the category of "police brutality, " while deplorable, does not amount to "torture." The term "torture," in United States and international usage, is usually reserved for extreme, deliberate and unusually cruel practices, for example, sustained systematic beating, application of electric currents to sensitive parts of the body, and tying up or hanging in positions that cause extreme pain. *See* European Court of Human Rights, *Judg. Court,* January 18, 1978, *Case of Ireland* v. *United Kingdom* Series A, No. 25, 2 E.H.R.R. 25, 80; European Commission of Human Rights, *Op. Com.,* 5 November 1969, *Greek Case,* § 11, XII p. 501.

The scope of the Convention is limited to torture "inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Thus, the Convention applies only to torture that occurs in the context of governmental authority, excluding torture that occurs as a wholly private act or, in terms more familiar in U.S. law, it applies to torture inflicted "under color of law." In addition, in our view, a public official may be deemed to "acquiesce" in a private act of torture only if the act is performed with his knowledge and the public official has a legal duty to intervene to prevent such activity.

The Convention excludes from the definition of torture such pain or suffering as arises only from or is inherent in or incidental to lawful sanctions. The term "sanctions" is not synonymous with the term "punishments." The word "punishments" may be construed more narrowly to comprehend only penalties for violation of a law, rule, or regulation, while the word "sanctions" includes as well penalties imposed in order to induce compliance. In the view of the United States, the term "sanctions" also embraces law enforcement actions other than judicially imposed penalties. The Convention does not specify whether the "lawfulness" of sanctions should be determined by domestic or international law. During the negotiations, support was expressed for both alternatives. Although law enforcement actions authorized by U.S. law are not performed with the specific intent to cause excruciating and agonizing pain or suffering (and therefore do not meet the definition of torture contained in Article 1), we believe it is desirable to express the understanding that the "lawfulness" of such actions would be determined by U.S. law or by judicial interpretation of such law, in order to guard against illegitimate claims that such law enforcement actions constitute torture.

The following understandings are recommended to reflect the United States understanding of Article 1 as explained above. These

understandings are intended to guard against the improper application of the Convention to legitimate U.S. law enforcement actions and thereby would protect U.S. law enforcement interests.

"The United States understands that, in order to constitute torture, an act must be a deliberate and calculated act of an extremely cruel and inhuman nature, specifically intended to inflict excruciating and agonizing physical or mental pain or suffering.

"The United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

"The United States understands that 'sanctions' includes not only judicially imposed sanctions but also other enforcement actions authorized by United States law or by judicial interpretation of such law.

"The United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have knowledge of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

"The United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture."

ARTICLE 2

Article 2 provides generally that each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. The term "territory under its jurisdiction" refers to all places that the State Party controls as a governmental authority, including ships and aircraft registered in that State.

In addition, Article 2 provides that no exceptional circumstances, such as war or public emergency, may be invoked as a justification for torture. The use of torture in wartime is already prohibited within the scope of the Geneva Conventions, to which the United States and virtually all other countries are Parties, and which in any event generally reflect customary international law. The exclusion of public emergency as an excuse for torture is necessary if the Convention is to have significant effect, as public emergencies are commonly invoked as a source of extraordinary powers or as a justification for limiting fundamental rights and freedoms.

Article 2 further provides that the plea of "superior orders" is not a defense to torture. The United States had proposed that the Convention expressly provide that superior orders nonetheless may be considered as a factor in mitigation of punishment, corresponding to the approach taken by the Nuremberg Tribunal. While this proposal was ultimately not adopted, it appears not to have been rejected. Rather, the matter has been left to the judgment of each State Party, and the United States could thus take superior orders into account in imposing criminal punishment for torture.

Under current U.S. military law, obedience to superior orders is not a defense to charges under the Uniform Code of Military Justice, unless the accused knew the orders to be unlawful or a person

of ordinary sense and understanding would have known the orders to be unlawful. Rule for Court Martial 916(d), *Manual for Courts-Martial* (Rev. 1984). As noted above, the United States understands torture to be limited to deliberate and calculated acts of an extremely cruel and inhuman nature, performed with a specific intent to cause severe pain or suffering. A person of ordinary sense and understanding would know such acts to be criminal. Therefore, no change in U.S. military law would be required by Article 2 of the Convention.

Although no circumstances justify torture, legitimate acts of self-defense or defense of others do not constitute torture as defined by Article 1, since they are not performed with the specific intent to cause excruciating and agonizing pain or suffering. To clarify that Article 2 does not affect the availability of these common law defenses, the following understanding is recommended:

> "The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."

ARTICLE 3

Article 3 provides that no State Party shall expel, return, or extradite a person to another State where substantial grounds exist for believing that he would be in danger of being subjected to torture.

Under current U.S. law, an individual may not normally be expelled or returned where his "life or freedom would be threatened * * * on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1). The U.S. Supreme Court has interpreted this provision to mean that a person entitled to its protections may not be deported to a country where it is more likely than not that he would be persecuted. *INS* v. *Stevic*, 467 U.S. 407 (1984). To clarify that Article 3 is not intended to alter this standard of proof, the following understanding is recommended:

> "The United States understands the phrase, 'where there are substantial grounds for believing that he would be in danger of being subjected to torture,' as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.'"

Article 3 would extend the prohibition on deportation under existing U.S. law to cases of torture not involving persecution on one of the listed impermissible grounds. This prohibition applies to expulsion or return of persons in the United States to a particular State, and does not grant a right to seek entry or to avoid expulsion to other States.

Article 3 would also add a further treaty basis for denying extradition as between States both of which are Parties to the Convention Against Torture. It was recognized, however, in the drafting of Article 3, that the obligation expressed might conflict in a given case with the obligation to extradite under a bilateral extradition treaty with a State which is not party to the Convention. Accordingly, it was acknowledged that some States Parties might wish to

make a reservation stating that they do not consider themselves bound by Article 3 insofar as it may not be compatible with their obligations toward States not party to the Convention under extradition treaties concluded before the date of the signature of the Convention.

Generally, the extradition treaties of the United States do not provide a basis for denying extradition on the grounds that an individual would be in danger of being subjected to "torture", as such, in the State to which he is extradited. It is likely that not all of the States with which we have extradition treaties will become parties to the Torture Convention. Thus, a conflict could conceivably arise between the obligation of the United States to extradite to a particular State under a bilateral extradition treaty, and our obligation under Article 3 of the Torture Convention not to extradite to any State where an individual would be in danger of being subjected to torture. The following reservation is recommended:

> "The United States does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not party to the Convention under bilateral extradition treaties with such States."

This reservation would eliminate the possibility of conflicting treaty obligations. This is not to say, however, that the United States would ever surrender a fugitive to a State where he would actually be in danger of being subjected to torture. Pursuant to his discretion under domestic law, and existing treaty bases for denying extradition, the Secretary of State would be able to satisfy himself on this issue before surrender. The reservation will enable the United States to avoid having to process claims under the Torture Convention when such potentially conflicting obligations are present. Instead, the executive branch will be free to act with relative speed and informality.

Article 3 further specifies that, in determining whether grounds exist to believe that an individual would be in danger of being subjected to torture, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights. The words "where applicable" indicate that the competent authorities must decide in each case whether and to what extent the existence of "human rights violations" in a given country is in fact a relevant factor in a particular case. For example, the gross and flagrant denial of freedom of the press, without more, would not generally raise a presumption of torture.

The reference in Article 3 to "competent authorities" appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return. The following declaration is recommended to specify the competent authorities:

> "The United States declares that the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases."

Because the Convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts.

ARTICLE 4

Article 4 provides that each State Party shall ensure that all acts of torture, as well as attempts to commit torture and complicity or participation in torture, are criminal offenses, punishable by appropriate penalties taking into account the grave nature of such offenses. This article, as well as the following Articles 5–7, are closely modeled on the provisions of the Conventions on Hijacking, Sabotage, Protection of Diplomats, and Hostages.

As discussed in greater detail in connection with Article 5, following, U.S. jurisdiction under existing law appears not to extend to acts of torture committed abroad. Acts of torture committed in the United States, however, as well as acts in the United States constituting an attempt or conspiracy to torture, would appear to violate criminal statutes under existing state or federal law. When such acts are subject to state jurisdiction, the offense would presumably be a common crime such as assault or murder. In particular cases, the nature of the activity or persons involved could give rise to a federal offense as well, such as interstate kidnapping or hostage-taking. *See, e.g.,* 18 U.S.C. § 112, § 114, § 115, § 878, § 1201 and § 1203.

Where the acts are subject to federal jurisdiction, similar common crimes are defined under federal criminal law, for example, assault, maiming, murder, manslaughter, attempt to commit murder or manslaughter, and rape. 18 U.S. § 113, § 114, § 1111, § 1112, § 1113, and § 2031. Conspiracy to commit the above crimes and being an accessory after the fact are also offenses. 18 U.S.C. § 3, § 371 and § 1117. Moreover, where acts are committed within the special maritime and territorial jurisdiction located within a state, federal law incorporates criminal offenses as defined by state law. 18 U.S.C. § 13.

In addition to such common criminal offenses, federal law defines two "constitutional crimes" that are particularly relevant. Under 18 U.S.C. § 241, conspiracy to injure, oppress, threaten or Intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States is a crime punishable by a $10,000 fine, up to ten years imprisonment, or both. Under 18 U.S.C. § 242, whoever willfully subjects any U.S. inhabitant to deprivation of such rights, privileges, or immunities under color of law, may be fined up to $1,000, or imprisoned for up to a year, or both. Under both statutes, the offender may be sentenced to life imprisonment where death results. In particular cases, certain other civil rights statutes might also be relevant. *See, e.g.,* 18 U.S.C. § 245 or § 594. Moreover, under 18 U.S.C. § 3571, for any offense occurring on or after December 11, 1987, an individual convicted for a felony or for a misdemeanor resulting in the loss of human life is subject to a possible fine of up to $250,000. If convicted for any other Class A misdemeanor, the individual is subject to a possible fine of up to $100,000.

In general, protection against torture is afforded by the 8th, 5th and 14th amendments to the U.S. Constitution. The eighth amendment prohibition of cruel and unusual punishment is, of the three, the most limited in scope, as this amendment has consistently been interpreted as protecting only "those convicted of crimes." *Ingraham* v. *Wright,* 430 U.S. 651, 664 (1977). The eighth amendment does, however, afford protection against torture and ill-treatment of persons in prison and similar situations of criminal punishment.

In other situations, the 5th and 14th amendments provide protection against torture. Such protection is afforded most generally by substantive due process protection of the right to personal security. *See Youngberg* v. *Romeo,* 457 U.S. 307, 315-6 (1982). The prohibition against self-incrimination also provides more specific protection against torture being used to coerce a confession. *Williams* v. *United States,* 341 U.S. 97 (1951). *Duncan* v. *Nelson,* 466 F.2d 939 (7th Cir. 1972), *cert. den.,* 409 U.S. 894 (1972).

Torture could, in particular circumstances, violate other constitutional rights as well, for example, the fourth amendment guarantees against unreasonable searches and seizures, or sixth amendment rights concerning trial.

In view of the above, it appears that the conduct of "torture" within the United States or U.S. jurisdiction will violate some federal or state criminal law. Existing law is therefore sufficient to implement Article 4, except to reach torture occurring outside U.S. jurisdiction, as discussed below.

ARTICLE 5

Article 5 provides that each State Party shall take necessary measures to establish its jurisdiction over torture offenses, as referred to in Article 4, in three circumstances: (1) when the offense is committed in any territory under its jurisdiction, or on board a ship or aircraft registered in that State (Article 5(1)(a)), (2) when the alleged offender is a national of that State (Article 5(1)(b)), and (3) when the alleged offender is present in any territory under its jurisdiction and is not extradited as provided in Article 8 (Article 5(2)). In addition, a State may, if it "considers it appropriate," establish its jurisdiction over cases in which the victim is one of its nationals (Article 5(1)(c)).

A major concern in drafting Article 5, and indeed, in drafting the Convention as a whole, was whether the Convention should provide for possible prosecution by any State in which the alleged offender is found—so-called universal jurisdiction. The United States strongly supported the provision for universal jurisdiction, on the grounds that torture, like hijacking, sabotage, hostage-taking, and attacks on internationally protected persons, is an offense of special international concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences. Provision for "universal jurisdiction" was also deemed important in view of the fact that the government of the country where official torture actually occurs may seldom be relied upon to take action. Of course,, if a foreign government were to use the universal jurisdiction provision5 contained in Articles 5-

7 to bring an unjustified prosecution against a U.S. citizen, the U.S. Government would strongly resist such an illegitimate action.

As discussed above, existing federal and state law appears sufficient to establish jurisdiction when the offense has allegedly been committed in any territory under U.S. jurisdiction or on board a ship or aircraft registered in the United States. *See* 18 U.S.C. § 7; 49 U.S.C. App. §§ 1301 (38), 1472. Implementing legislation is therefore needed only to establish Article 5(1)(b) jurisdiction over offenses committed by U.S. nationals outside the United States, and to establish Article 5(2) jurisdiction over foreign offenders committing torture abroad who are later found in territory under U.S. jurisdiction. Recommended legislation will be transmitted to Congress by the Department of Justice. Similar legislation has already been enacted to implement comparable provisions of the Conventions on Hijacking, Sabotage, Hostages, and Protection of Diplomats. 18 U.S.C. § 32, § 112(e), § 878(d), § 1116(c), § 1201(e), and § 1203; 49 U.S.C. App. § 1301(38)(d) and § 1472(n).

The following declaration is recommended:

> "The United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted."

ARTICLE 6

Article 6 describes the procedures to be followed when an alleged offender is found in the territory of a State Party. First, where the State is satisfied that the circumstances so warrant, based on an examination of the available information, the State must take the alleged offender into custody or take other legal measures to secure his presence, as provided by its law, until such time as is necessary to enable either criminal proceedings or extradition to be instituted.

When the individual held in custody is not a national of the holding State, he must be assisted in communicating with a representative of the State of which he is a national. This step reflects the customary international procedure when a non-national is held in custody. (1963 Vienna Convention on Consular Relations, Article 36(1)(b), TIAS 6820, 21 UST 77.)

The State that takes the individual into custody must also notify those States that could also have jurisdiction over the offense under Article 5 of this fact and of the circumstances that warrant his detention. The State must make a "preliminary inquiry into the facts" and inform other interested States of its findings and whether it intends to exercise jurisdiction.

This provision is closely modeled after comparable provisions of the Conventions on Hijacking, Sabotage, Protection of Diplomats, and Hostages, with certain drafting clarifications. In paragraph 1, the phrase "after an examination of information available to it" was added in order to make clear that the decision whether to take an individual into custody entails an examination of available information even though a stalled "preliminary" investigation will be made subsequently. The word "legal" was added to the phrase "custody or other measures" ("custody or other legal measures") in

order to guard against an overly broad interpretation of the word "measures."

The implementation of this provision relies on existing law and procedure for investigating alleged crimes and no further implementing legislation is required.

ARTICLE 7

Article 7 provisions that if a State does not extradite an alleged offender found within its jurisdiction, it shall "submit the case to its competent authorities for the purpose of prosecution." A comparable provision is found in the Conventions on Hijacking, Sabotage, Protection of Diplomats, and Hostages.

Substantial debate occurred on whether to include this strict so-called extradite or prosecute rule in the Convention. A number of State proposed a weaker formulation—that a State would be obligated to submit a case for prosecution only where a request for extradition is received and refused. The United States and others were concerned, however, that a weaker provision would create "a loophole in the Convention, thereby creating potential safe-havens for torturers." After lengthy consideration, the stronger provision was adopted in 1984.

In case where torture is alleged and a State does not extradite the alleged torturer, Article 7 does not require prosecution. Rather, it requires submission of the case to competent authorities "for the purpose of prosecution." The decision whether to prosecute entails a judgment whether a sufficient legal and factual basis exists for such an action. (WG 82, para. 27.) Paragraph 2 of Article 7 provides accordingly that "these authorities shall take their decision [regarding prosecution] in the same manner as in the case of any ordinary offense of a serious nature under the law of that State." Paragraph 2 implicitly recognizes that the law of each State should be used to determine "the standards of evidence required for prosecution and conviction" and provides that no lesser standard shall be applied when jurisdiction is asserted on the basis of the presence of the offender than is applied when the alleged offender is a national or when the alleged offense occurred within the acting State's territory.

Although Article 5 provides for universal jurisdiction over acts of torture, the United States is not generally the most appropriate forum for hearing cases involving acts of torture committed in foreign countries by one alien against another. Instead, the State where the torture occurred has a greater interest than does the United States in prosecution. The following declaration is therefore recommended:

> "The United States declares that it will submit a case involving alleged torture committed by an alien outside the United States to its competent authorities for the purpose of prosecution, pursuant to Article 7(1) of the Convention, only if extradition of the offender to the State where the offense was committed is not an adequate alternative.

The application of immunities from criminal prosecution, such as those immunities enjoyed by diplomats under the Vienna Convention on Diplomatic Relations, was not explicitly discussed during

the negotiation of the Convention. Article 7(2), however, implicitly recognizes that such immunities are not affected by the Convention, by stating that the authorities "shall take their decision in the same manner as in the case of any ordinary offense of a serious nature." (The question of immunities also arises under Article 14, which obligates States Parties to provide an enforceable right to fair and adequate compensation.)

Finally, Article 7(3) provides generally that the alleged offender "shall be guaranteed fair treatment at all stages of the proceedings." This paragraph stems from a U.S. proposal and is intended to safeguard the rights of the accused.

ARTICLE 8

Article 8 addresses the legal framework for extradition of alleged offenders. This provision, which is also modeled on corresponding provisions in the Conventions on Hijacking, Sabotage, Protection of Diplomats, and Hostages, was initially proposed by the United States. Paragraph 1 provides that the offenses described in Article 4 will be "deemed to be included as extraditable offenses" in preexisting extradition treaties between States Parties to the Convention and will be included in future extradition treaties which are concluded. The terms of such bilateral extradition treaties, and not the Convention Against Torture, will determine whether or not the United States has an obligation to extradite in a given case.

Paragraphs 2 and 3 concern extradition requests when no bilateral extradition treaty exists between the requesting and requested State. If, under the law of the requested State, a treaty is required for extradition, that State may at its option consider the Convention as the treaty that provides the legal basis for extradition. If, on the other hand, the law of the requested State permits extradition without a treat. must extradite subject to the conditions established by its law.

Under U.S. law, a treaty is required for extradition from the United States. However, relevant U.S. Supreme Court decisions indicate that Article 8 alone would not provide a sufficient treaty basis for extradition.

ARTICLE 9

This article, also modeled on the Conventions on Hijacking, Sabotage, Protection of Diplomats, and Hostages, provides that States "shall afford one another the greatest measure of assistance in connection with criminal proceedings" under the Convention, including the supply of all evidence at their disposal necessary for the proceedings.

A U.S. proposal that Article 9(1) further provide that "the law of the State requested shall apply in all cases was not adopted, but it appeared to be generally recognized that the law of the requested State would apply to determine the scope of the assistance that can be afforded.

The second paragraph of Article 9 differs from the corresponding provision of the Conventions on Hijacking, Sabotage, Protection of Diplomats, and Hostages. These Conventions, and the initial draft of the Convention Against Torture, provide that the obligation con-

tained in paragraph 1 "shall not affect" mutual judicial assistance obligations contained in other treaties. This was revised, however, in the final text of the Torture Convention to provide that the obligation contained in paragraph 1 shall be carried out "in conformity with" any other treaties on mutual judicial assistance. This revision was intended to make it clear that paragraph 2 should not be interpreted to weaken the obligation established by paragraph 1.

In the event that no treaty on mutual judicial assistance is in effect between the respective States, Article 9(2) is irrelevant and assistance would be afforded as provided in Article 9(1) of the Convention.

ARTICLES 10 AND 11

Article 10 provides that States Parties shall ensure that education and information regarding the prohibition against torture are fully included in the training of persons who may be involved in the custody, interrogation, or treatment of persons arrested, detained, or imprisoned. Article 11 further provides that each State shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for custody and treatment with a view toward preventing cases of torture.

In keeping with the federal-state reservation discussed above, the United States would implement these obligations with respect to law enforcement forces acting under its authority or control; with respect to law enforcement forces acting under the authority or control of the states or municipalities, the Federal Government would take appropriate measures to the end that the competent authorities of the states may take appropriate measures for the fulfillment of Articles 10 and 11.

ARTICLES 12 AND 13

Article 12 provides that the competent authorities of a State will proceed to "a prompt and impartial investigation, whenever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction." Such an investigation is to be made on the initiative of the State authorities and not only when a formal complaint is made.

Article 13 provides that an individual should have the right to bring a complaint of torture and to have his case promptly and impartially examined by the competent authorities. In such event, the State must take steps where necessary to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of bringing the complaint or giving evidence with respect to it.

ARTICLE 14

Article 14 provides that a victim of torture shall have a legal right to redress and an enforceable right to fair and adequate compensation. Where the victim dies as a result of torture, his dependents shall he entitled to compensation.

The negotiating history of the Convention indicates that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in its territory, not for

acts of torture occurring abroad. Article 14 was in fact adopted with express reference to "the victim of an act of torture *committed in any territory under its jurisdiction.*" The italicized wording appears to have been deleted by mistake. This interpretation is confirmed by the absence of any discussion of the issue, since the creation of a "universal" right to sue would have been as controversial as was the creation of "universal jurisdiction," if not more so.

The following understanding is recommended:

> "It is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party."

A question could be raised whether Article 14 is intended to require a victim compensation scheme or whether it is sufficient that victims have a right to bring a civil suit against the alleged torturer. Either approach would seem to provide "an enforceable right to fair and adequate compensation" as required by the text of Article 14. The negotiating history confirms this view, in that no requirement of a victim compensation scheme was discussed, nor does such an interpretation appear to have been suggested, notwithstanding that many if not more countries, including the United States, do not have such schemes.

Existing U.S. law already establishes private rights of suit sufficient to implement Article 14. Such a suit could take the form of a common law tort action, a civil action for violation of civil rights under 42 U.S.C. §§ 1981–1992, or a suit for constitutional tort. *See, e.g., Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and *Carlson* v. *Green*, 446 U.S. 14 (1980). In the hypothetical case of an authorized federal action in which the individual defendants could claim immunity from civil suit, an action could be brought against the United States. 28 U.S.C. § 1346(b) and § 2674. Although some U.S. courts have held that current U.S. law provides a private right of action for acts of torture occurring outside the United States, *see, e.g., Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), as discussed above this result is not compelled by the Convention.

There is no indication in the legislative history that Article 14 was intended to affect the immunities from civil jurisdiction and liability that States and certain individuals enjoy.

ARTICLE 15

This article establishes an exclusionary rule of evidence: no statement that is established to have been made as a result of torture shall be used as evidence in any proceeding, except against an alleged torturer as evidence of torture. This rule of exclusion, by the plain terms of Article 15, applies only to the statement itself and not to so-called fruits of the statement. The latter doctrine is a feature of U.S. constitutional law but is not applied in international practice.

Statements made under torture generally would be subject to exclusion under U.S. rules of evidence. Such statements could not be used against the person making them, since the statements would be involuntary. The United States rules against admissibility of il-

legally obtained evidence and involuntary confessions are stricter than is provided for under the Convention. Where a statement made under torture is invoked against a third party, a question could arise as to whether that party had standing to raise the illegality of the means of obtaining such evidence as a ground for exclusion. As a practical matter, however, the hearsay rule would generally operate to exclude such statements, where sought to be introduced against third parties.

ARTICLE 16

Article 16 addresses other forms of cruel, inhuman, or degrading treatment or punishment not amounting to torture (hereafter "CIDT"). Initially, the Convention provided much the same obligations with respect to torture and CIDT. The United States as well as a number of other countries expressed concern with this approach, noting that the attempt to establish the same obligations for torture as for lesser forms of ill-treatment would result either in defining obligations concerning CIDT that were overly stringent or in defining obligations concerning torture that were overly weak. This view prevailed and Article 16 thus creates a separate and more limited obligation with respect to CIDT not amounting to torture.

Article 16 provides that States undertake to prevent CIDT not amounting to torture in territories within their jurisdiction. Article 16 thus embodies an undertaking to take measures to prevent CIDT rather than a prohibition of CIDT. The particular steps that must be take in order to prevent CIDT are those specified in Articles 10–13: appropriate training of law enforcement and other appropriate personnel, review of interrogation and detention rules and practices, investigation by State authorities, and making available the right to bring a complaint for investigation.

As provided in paragraph 2, the limited scope of Article 16 is without prejudice to more extensive rights and obligations that may be established by any other applicable national or international law.

Article 16 is arguably broader than existing U.S. law. The phrase "cruel, inhuman or degrading treatment or punishment" is a standard formula in international instruments and is found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights. To the extent the phrase has been interpreted in the context of those agreements, "cruel" and "inhuman" treatment or punishment appears to be roughly equivalent to the treatment or punishment barred in the United States by the 5th, 8th and 14th amendments. "Degrading" treatment or punishment, however, has been interpreted as potentially including treatment that would probably not be prohibited by the U.S. Constitution. *See, e.g.*, European Commission of Human Rights, *Dec. on Adm.*, Dec. 15, 1977, *Case of X* v. *Federal Republic of Germany* (No. 6694/74), 11 Dec. & Rep. 16 (refusal of authorities to give formal recognition to an individual's change of sex might constitute "degrading" treatment). To make clear that the United States construes the phrase to be coextensive with its constitutional guarantees against

cruel, unusual, and inhumane treatment, the following understanding is recommended:

> "The United States understands the term 'cruel, inhuman or degrading treatment or punishment,' as used in Article 16 of the Convention, to mean the cruel, unusual, and inhumane treatment or punishment prohibited by the 5th, 8th and/or 14th amendments to the Constitution of the United States."

Because Article 16 requires States Parties to apply the obligations in Articles 10–13 to cases of cruel, inhumane or degrading treatment or punishment, the questions regarding implementation noted in connection with these Articles apply also with respect to Article 16. Like Articles 10–13, Article 16 could be implemented by an appropriate combination of federal and state action and the federal-state reservation proposed above would be relevant.

ARTICLES 17–24 AND 28

These articles establish an international Committee Against Torture that functions as an oversight and enforcement body with respect to obligations of States Parties under the Convention. The creation of such a treaty body is a standard procedure; similar bodies were established, for example, by the International Convention on Civil and Political Rights and the Convention on the Elimination of Racial Discrimination (both of these Conventions cave been signed but not ratified by the United States).

The Committee Against Torture consists of ten "experts of high moral standing and recognized competence in the field of human rights" serving in their individual capacity and not as representatives of governments. (Article 17.) These experts are elected for four-year terms by a secret ballot of States Parties from among persons who are nominated by States Parties. The appointment of stalled "temporary alternates," who may tend to be government officials rather than independent experts, is not permitted. The States Parties to the Convention are responsible for the expenses of the Committee, which are expected to be approximately $750,000 annually. (Article 18.) The U.S. contribution would be calculated proportionately on the basis of the scale of assessments for apportioning the U.N. budget, with a ceiling of 25 percent. On this basis, the U.S. contribution would be approximately $187,000 per year.

The Committee is empowered to review reports submitted by States Parties on the measures they have taken to give effect to their undertakings under the Convention and to make "general comments" on these reports. (Article 19.)

The Convention provides three additional powers of the Committee which it can exercise only with respect to States that choose to grant it these powers. First, the Committee may conduct investigations on its own initiative when it "receives reliable information which appears to it to contain well-founded indications that torture is being systematically practiced." (Article 20.) A State may, however, make a declaration upon signature, ratification or accession that it does not recognize such competence. (Article 28.) Second, a State may make a declaration recognizing the competence of the Committee to consider claims made by another State Party that the former State is not fulfilling its obligations under the Conven-

tion. (Article 21.) Finally, a State may make a declaration recognizing the competence of the Committee to consider communications made by or on behalf of individuals claiming to be victims of a violation of the Convention by that State. (Article 22.)

The procedures to be followed in each of these cases are spelled out in the respective article of the Convention. Complaints by States and communications by or on behalf of individuals are not admissible until all available domestic remedies have been exhausted, except there the application of such remedies is unreasonably prolonged or unlikely to bring effective relief to the individual alleged to be the victim. A State that is subject to a complaint, communication, or investigation is given an opportunity to explain and refute allegations made against it. Communications and complaints are considered in closed, confidential sessions.

When the Committee has considered a State complaint or an individual communication, its conclusions are presented to the parties directly concerned. When the Committee investigates a situation of alleged systematic practice of torture, its findings are transmitted to the State Party concerned along with "any comments or suggestions which seem appropriate in view of the situation."

In carrying out these functions, the Committee functions as an investigatory body and not as a court; it is not empowered to issue an award against or an order to a State Party. Where a State brings a claim against another State under Article 21, however, the Committee may set up an *ad hoc* conciliation commission which would attempt to seek a "friendly solution."

The members of the Committee and of any conciliation commission that may be appointed are entitled to the facilities, privileges, and immunities of experts on mission for the United Nations as established by the Convention on the Privileges and Immunities of the United Nations. (Article 23.) The United States is a party to this Convention.

We recommend that, before accepting the competence of the Committee against Torture under Article 20 to initiate confidential investigations of the United States, we should have an opportunity to evaluate the Committee's work. Accordingly, we recommend that the United States make the following reservation:

> "Pursuant to article 28(1), the United States declares that it does not recognize the competence of the Committee Against Torture under Article 20."

It would be possible in the future to accept the competence of the Committee should experience with the Committee prove satisfactory and should this step appear desirable.

For the same reasons, we recommend that the United States not at this time make declarations upon deposit of the United States instrument of ratification, pursuant to Articles 21 and 22 of the Convention, recognizing the competence of the Committee Against Torture to receive and consider communications from States and individuals alleging that the United States is violating the Convention. As with the Committee's Article 20 powers, we should delay a final U.S. decision concerning the Committee's powers under Articles 21 and 22 until a sufficient body of experience with the Committee has been developed and we are able to evaluate its work.

ARTICLES 25–33

The final clauses of the Convention are relatively standard. The Convention is open for signature by all States, subject to ratification, or for accession by any State. (Articles 25 and 26.) Pursuant to Article 27, the Convention entered into force on June 26, 198, thirty days after the twentieth State had become a Party. Any State may terminate its adherence to the treaty, effective one year after notice is given, but such termination shall not affect obligations regarding acts or omissions prior to the effective date of termination. (Article 31.)

The Convention can also be amended by a majority of States Parties present and voting at a conference called for that purpose. Such an amendment shall not be effective, however, until two-thirds of all States Parties have accepted it, and shall be binding only on those States that specifically accept it. (Article 29.)

The Convention also provides in Article 30(1) that disputes between two or more States Parties concerning the interpretation or application of this Convention may be submitted to *ad hoc* arbitration, or, failing agreement on the organization of such arbitration, to the International Court of Justice. Article 30(2) provides that a State may make a declaration excluding this di5pute resolution obligation at the time of signature, ratification, or accession. In October 1985, the United States withdrew its declaration under Article 36 of the Statute of the International Court of Justice accepting the compulsory jurisdiction of the Court. Consistent with that decision, the following reservation is recommended:

> "Pursuant to Article 30(2) of the Convention, the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case."

This reservation would allow the United States to agree to an adjudication by a chamber of the Court in a particular case, if that were deemed desirable.

The U.N. Secretary-General is the depository for the Convention. (Articles 26 and 32.) The respective texts in all U.N. official languages are equally authentic. (Article 33.)

COST ESTIMATE

The Congressional Budget Office has supplied the committee with the following information on the possible budgetary impact of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, DC 20515, August 17, 1990.

Honorable CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC 20510

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed Treaty Document 100-20, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, as ordered reported by the Senate Committee on Foreign Re-

lations on July 19, 1990. Ratification of the Convention is estimated to cost the Federal Government between $250,000 and $350,000 annually.

The Committee on Foreign Relations has recommended that the Senate advise and consent to ratification of the Convention. The Convention ultimately would be ratified by executive action.

Ratification of the Convention would obligate the United States to help pay the costs of the Committee Against Torture, a body designed to oversee the obligations of countries that have ratified the Convention. Currently, the Committee Against Torture has an annual budget of approximately $1 million. If the United States would pay, consistent with U.S. obligations to many other international organizations, 25 to 35 percent of the annual budget, the cost to the Federal Government would be between $250,000 and $350,000 annually. However, no authorizations of appropriations have been included with the treaty document.

Ratification of the Convention would not affect the budgets of state or local governments.

Should you so desire, we would be pleased to provide further details on this estimate. The CBO staff contact is Kent Christensen at 226-2840.

Sincerely,

ROBERT D. REISCHAUER,
Director.

TEXT OF RESOLUTION OF RATIFICATION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988, Provided that:

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States shall implement the Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention.

(2) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the 5th, 8th, and/or 14th amendments to the Constitution of the United States.

(3) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1)(a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the 5th, 8th and/or 14th amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

III. The Senate's advice and consent is subject to the following declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee Against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the abovementioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

ADDITIONAL VIEWS OF REPUBLICAN SENATORS ON THE CONVENTION AGAINST TORTURE

The undersigned Republican Senators strongly support the object and purpose of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We believe that prompt ratification of the convention will demonstrate the abhorrence of our Nation toward torture, and encourage more widespread prompt ratification of the convention among the community of nations.

Unfortunately, approval to report out the resolution of ratification occurred in committee without the presence of Republican members. In fact, no discussion of the convention at all took place during the business meeting at which it was reported, 10–0. The absence of Republican members in no way reflects a lack of support for the convention. Indeed, the Convention Against Torture was negotiated with bipartisan support. The resolution of ratification incorporated the package of reservations, understandings, and declarations submitted by the administration, and has the full support of the undersigned.

While a number of Republicans were engaged in urgent Senate business—the 1990 farm bill commenced debate on the Senate floor during the time of the business meeting—others declined to be present at the business meeting to protest the inadequate notice given by the chairman to mark up an entirely different piece of complex legislation, providing for aid to Eastern Europe and the Soviet Union. Thus the Torture Convention got caught up in an unrelated dispute when the chairman took advantage of the rare presence of all Democratic members, a bare quorum, to approve the convention without debate.

The dispute over the markup of the East European aid measure was, in the view of the Republican members, unfortunate and unnecessary. Over the weeks, the Democratic majority had proposed at least a dozen draft versions of the bill, each with wildly varying funding levels, unorthodox programs, complex authorities, and changing eligibilities. In the week prior to the scheduled markup, four different drafts were presented, the last version only hours before the announced time of the markup.

No documentation was provided for the changes in each version, the last of which was 114 pages long, not in due form, and lacking line numbers. Many of us felt that to participate in a markup under such circumstances would make a mockery of our obligations as Senators.

It was unfortunate that the Torture Convention was taken up under such circumstances. Perhaps the chairman decided to take advantage of the full Democratic attendance; indeed, in all but one of the seven previous business meetings, a larger percentage oF the Republican members than of the Democratic members was present

and voting. In any case, no Republican had any intention of delaying consideration of the convention.

One of the most important mandates of the Foreign Relations Committee is to make recommendations to the Senate regarding treaties submitted by the President for advice and consent. Treaties usually impose upon our Nation obligations which last in perpetuity and are difficult to alter. For that reason, it is important that bipartisan participation demonstrate wide U.S. acceptance of treaty obligations, from the committee level to the Senate floor. In this instance, there was bipartisan support. Nevertheless, the action of the committee in reporting the convention without Republican participation was a failure of comity which implied a diminished appreciation of our international obligations.

Some Republican members had intended to offer and support amendments to the resolution of ratification had the committee considered the convention with Republicans present. These amendments had been discussed at length over the past 6 months with the administration, and among committee members and staff; indeed, it is our understanding the majority and the administration were prepared to accept at least some of the amendments proposed.

We hope that, before the convention is debated on the Senate floor, the chairman will convene an early business meeting to allow discussion of the Torture Convention, and to allow any interested Senators an opportunity to propose amendments to the resolution of ratification, which, if approved by the committee, would be offered as committee amendments on the Senate floor.

JESSE HELMS.
RICHARD G. LUGAR.
NANCY L. KASSEBAUM.
RUDY BOSCHWITZ.
LARRY PRESSLER.
FRANK H. MURKOWSKI.
MITCH MCCONNELL.
GORDON J. HUMPHREY.
CONNIE MACK.

APPENDIX A

BUSH ADMINISTRATION RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS, AS TRANSMITTED

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PELL

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.,
December 10, 1989.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: In his message of May 23, 1988, President Reagan transmitted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Senate for its advice and consent to ratification. As you know, the Convention was adopted by unanimous agreement of the U.N. General Assembly on December 10, 1984, and entered into force on June 26, 1987. The United States signed it on April 18, 1988. Accompanying the transmittal of the Convention to the Senate was the report of the Secretary of State containing a number of proposed reservations, understandings, and declarations.

In your letter to the Secretary of State dated July 24, 1989,.you expressed concern that the administration's proposed package faced substantial opposition from human rights groups and other interested parties. In particular, you were concerned with the overall length and breadth of the package, and the understandings concerning the definition of torture. According to critics of the proposed package, the understandings to the definition of torture could be construed to raise "the threshold of pain that an individual must suffer" and to permit "certain circumstances and justifications for torture."

By letter of September 20, 1989 (copy enclosed), we agreed to review the original package and simultaneously informed you that we planned to drop the proposed reservations pursuant to Article 28(1) not recognizing the competence of the committee against torture provided for in Article 20 and that we further planned to make a declaration pursuant to Article 21 of the Convention, recognizing the competence of the committee to receive and consider, on a reciprocal basis, communications from States alleging that the United States is violating the Convention.

We have now completed that review, and I am pleased to submit herewith the enclosed revised package of reservations, understandings, and declarations for consideration by the Senate. Reflecting our consultations with various interested groups in the private sector, the package now contains a revised understanding to the definition of torture, which would not raise the high threshold of pain already required under international law, clarifies the definition of mental pain and suffering, and maintains our position that specific intent is required for torture. The revised package also eliminates the understanding relating to "common-law" defenses, makes it clear that the United States does not regard authorized sanctions that unquestionably violate international law as "lawful sanctions" exempt from the prohibition on torture, and removes our reservation to the obligation not to extradite individuals if we believe they would be tortured upon return. (Of course, consistent with our letter of September 20, 1989, the revised package contains a declaration pursuant to Article 21 of the Convention, recognizing the competence of the committee against torture to receive and consider, on a reciprocal basis, communications from States alleging that the United States is violating the Convention.)

Our revised package is the result of lengthy discussions among the Departments of State, Justice, and Defense. We look forward to the opportunity to explain fully the administration's proposed revised package of reservations, understandings, and

declarations at the hearing before the Committee on Foreign Relations early next session. Each of the reservations, declarations, and understandings to the Convention in the revised package is explained briefly in the enclosure.

Sincerely yours,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

RESERVATIONS

1. *General.*—"The United states chat] implement the Convention to the extent that the Federal Government exercises legislative and judicial jurisdiction over the matters covered therein; to the extent that constituent units exercise jurisdiction over such matters, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Convention."

Explanation: Retained without modification from the 1988' transmittal.

2. *Article 16.*—"The United States considers itself bound by the obligation under Article 16 to prevent cruel, inhuman or degrading treatment or punishment,' only insofar as the term 'cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the 'Constitution of the United States."

Explanation: Changed from an understanding to a reservation.

3. *Article 30.*—"Pursuant to Article 30(2) of the Convention, the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case."

Explanation: Retained without modification from the 1988 transmittal.

UNDERSTANDINGS

1. *Article 1.*—a. "The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

Explanation: Revised to clarify the definition of mental harm.

b. "The United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

Explanation: Retained without modification from the 1988 transmittal.

c. "The United States understands that 'sanctions' includes judicially imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law provided that such sanctions or actions are not clearly prohibited under international law."

Explanation: Revised to require that, for purposes of the definition of lawful sanctions, any U.S. sanctions or sanctions permitted under U.S. law be not clearly prohibited under international law.

d. "The United States understands that the term 'acquiescence' requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

Explanation: Changed "knowledge" to "awareness" to make it clearer that both actual knowledge and willful blindness fall within the meaning of acquiescence.

e. "The United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture."

Explanation: Retained without modification from the 1988 transmittal.

2. *Article 3.*—"The United States understands the phrase, where there are substantial grounds for believing that he would be in danger of being subjected to torture, as used in Article 3 of the Convention, to mean 'if it is more likely than not that he would be tortured.' "

Explanation: Retained without modification from the 1988 transmittal.

3. *Article 14.*—"It is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State party."

Explanation: Retained without modification from the 1988 transmittal.

DECLARATIONS

1. *General.*—"The United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."

Explanation: Retained without modification from the 1988 transmittal.

2. *Article 21.*—"The United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State party claims that another state party not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration."

Explanation: Corollary to dropping the reservation in the previous package that declared that the United States does not recognize the competence of the Committee against Torture under Article 20.

OMISSIONS

The following reservations, declarations and understandings in the 1988 transmittal have been deleted. We will explain in full before the Senate the reasons for their deletion.

Reservations Omitted

"The United States does not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States toward States not party to the Convention under bilateral extradition treaties with such States."

Explanation for deletion: Upon further reflection, this provision was deemed unnecessary because it could be construed to indicate that the U.S. was retaining, insofar as it relates to nonparties, the juridical right to send a person back to a country where that person would be tortured. Such was never the intent.

"Pursuant to Article 28(1), the United States declares that it does not recognize the competence of the Committee against Torture under Article 20.'

Explanation for deletion: See declaration under Article 21 above.

Understanding Omitted

"The United States understands that paragraph 2 of Article 2 does not preclude the availability of relevant common law defenses, including but not limited to self-defense and defense of others."

Explanation for deletion: Upon reflection, this understanding was felt to be no longer necessary.

Declarations Omitted

"The United States will not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted."

Explanation for deletion: Although it remains our intention to not deposit the instrument of ratification until after the implementing legislation of the Convention has been enacted, it is not necessary that this declaration be included in the formal instrument of ratification.

"The United States declares that the phrase, 'competent authorities,' as used in Article 3 of the Convention, refers to the Secretary of State in extradition cases and to the Attorney General in deportation cases."

Explanation for deletion: Although it remains true that the competent authorities referred to in Article 3 would be the Secretary of State in extradition cases and the Attorney General in deportation cases, it is not necessary to include this declaration in the formal instrument of ratification.

"The United States declares that it will submit a case involving alleged torture committed by an alien outside the United States to its competent authorities for the purpose of prosecution, pursuant to Article 7(1) of the Convention, only if extradition of the offender to the State where the offense was committed is not an adequate alternative."

Explanation for deletion: Although it remains our intention to submit a case for prosecution only when extradition is not an adequate alternative, it is not necessary to include this declaration in the formal instrument of ratification.

Understanding proposed by the Bush administration during the hearing on the Convention on January 30, 1990:

UNDERSTANDING

1. *General.*—"The United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty."

APPENDIX B

CORRESPONDENCE FROM THE BUSH ADMINISTRATION TO MEMBERS OF THE FOREIGN RELATIONS COMMITTEE

LETTERS FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PELL

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.
September 20, 1989.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am responding to your recent letter to Secretary Baker concerning the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

We are pleased that a hearing on the Convention has been scheduled by the Committee on Foreign Relations for September 26. We look forward to the opportunity to explain fully the administration's proposed package of reservations, understandings, and declarations. In anticipation of Senate consideration, we have been conducting a serious review of that package, as you suggested in your letter. Pursuant to that review, we have determined to drop the proposed reservations pursuant to Article 28(1) not recognizing the competence of the Committee against Torture provided for in Article 20 and also to make a declaration pursuant to Article 21 of the Convention, recognizing the competence of the Committee against Torture to receive and consider, on a reciprocal basis, communications from State alleging that the United States is violating the Convention. The reasons underlying this change will be explained during the hearings. Other possible modifications to the package are still under review.

As Secretary Baker indicated in his letter to you of June 13, officers of the Departments of State and Justice stand ready to discuss the Convention, and the proposed ratification package, with committee staff in advance of the hearings, if that would be useful. Ratification of this important human rights convention is a matter of priority for the administration, and we look forward to early and favorable consideration by the committee and the Senate.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR PRESSLER

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.
April 4, 1990.

Senator PRESSLER,
U.S. Senate, Washington, DC.

DEAR SENATOR PRESSLER: During the recent hearing before the Senate Foreign Relations Committee on the U.N. Convention Against Torture, you posed a number of specific questions about various provisions of the Convention. The Department shares most of the concerns you identified and has dealt with them in the proposed package of reservations, understandings, and declarations I sent to Chairman Pell on behalf of the administration.

First, you indicated that you do not support acceptance of the compulsory jurisdiction of the International Court of Justice. We share that view. We have proposed specifically that the United States declare, at the time of ratification, that it does not accept that provision of the Convention which establishes compulsory jurisdiction. We have asked that the Senate's resolution of advice and consent expressly support such a reservation.

Second, you indicated that the meaning of the phrase "cruel, inhuman and degrading treatment or punishment," as used in Article 16 of the Convention, is unclear. Again, we agree. Precisely for that reason, we have proposed a reservation to Article 16 which limits our undertakings to punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution.

Third, you stated that you do not like the role of the committee against torture found in Articles 17 through 24. The committee is given three different functions under the Convention, and we would ask you to assess each of them separately:

—first, the committee is empowered to look into country situations where there is reliable information containing well-founded indications that torture is being systematically practiced.

—second, the committee is empowered to look into complaints from States that a State party is not fulfilling its obligations under the Convention.

—third, the committee is empowered to look into individual complaints of torture.

We proposed to accept the first two competences of the committee, but not the third.

With respect to the first, there is no possibility of a well-founded indication of systematic torture in the United States, and very little possibility of even a politicized committee making such a finding. (To our knowledge, no human rights group has ever accused the United States of systematic torture.) The United States is, in any event, already exposed to the possibility of a politically motivated finding in the U.N. Human Rights Commission; it has not occurred. With respect to the second competence, the committee can only receive complaints from States which also accept the competence of the committee. States with political motivation to charge the United States with torture are unlikely to expose themselves to reciprocal charges. Moreover, the committee has no authority to make binding decisions. For these reasons, the United States has nothing to fear from the committee. On the other hand, we believe strongly that our substantial interest in eliminating torture, which you share, would be served by participating in the work of the committee and directing its attention to situations where torture is practiced.

However, we do not believe that we should accept the committee's third competence, to hear complaints from individuals against the United States. Although the complaints are likely to be frivolous (especially because they can only be considered if the complaining individual has first exhausted "all available domestic remedies"), it could consume substantial U.S. Government resources to respond to them.

The approach that we have recommended, of accepting the competence of the committee in part, was adopted by the United Kingdom in ratifying the Convention, Most of our European allies have accepted the full competence of the committee. The Soviets and the Eastern Bloc countries have rejected the committee's competence completely, but these are actions taken before the major recent changes in the political landscape and may be reversed, at least in the case of some Eastern European countries. We would also ask you, in considering whether the U.S. needs to be as concerned as previously with the committee, to note that four Eastern European countries joined this past month in the United Nations in criticizing the human rights situation in Cuba and that the Soviets have also started to criticize publicly the situation there.

Fourth, you questioned the omission of the understanding on common law defenses originally proposed by the Reagan administration. Upon reflection, we omitted this provision as it was no longer necessary and was potentially counterproductive. We believe that the revised first understanding under Article 1 concerning specific intent and mental harm and the understanding on custody adequately reflect the primary interest behind the former understanding to Article 2. Because the Convention applies only to custodial situations, i.e., when the person is actually under the control of a public official, the legitimate right of self-defense is not affected by the Convention. Moreover, to sustain a successful prosecution it will be necessary to establish beyond a reasonable doubt that the alleged perpetrator formed the specific intent to commit torture. Paragraph 2 of Article 2 of the Convention states that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." We accept this provision, without res-

ervation. As indicated by President Reagan when he transmitted the Torture Convention to the Senate, no circumstances can justify torture.

The Reagan administration, without in any way narrowing the prohibition on torture, had thought it desirable to clarify that the Convention does not preclude the availability of relevant common law defenses, including self-defense and defense of others. That is, the Convention does not prevent a person from acting in self-defense, as long as he does not torture. While there was no opposition to this concept, substantial concern was expressed that if this understanding were included in the instrument of ratification, it would be misinterpreted or misused by other states to justify torture in certain circumstances. We concluded that this concern was justified and therefore reviewed whether the understanding was necessary. We decided it was not, since nothing in the Convention purports to limit defenses of actions which are not committed with the specific intent to torture. We would not object to your including this letter in the Senate report on the Convention, so that U.S. courts are clear on this point.

Fifth, you indicated your strong belief that, as with the Genocide Convention, implementing legislation must be adopted before the President deposits the instrument of ratification for the Convention. We agree completely. We will not deposit the instrument of ratification until the necessary implementing legislation has been adopted.

Sixth, you indicated that you "do not support treaties which change American domestic law and legal procedures" and asked what has happened to the legal requirement that "no one can be subjected to trial and punishment under American law without a statute first having defined the crime and then provided for a specific punishment." We have proposed a formal declaration that the Convention is not "self-executing." Any prosecution (or civil action) in the United States for torture will necessarily be pursuant to existing or subsequently enacted Federal or State law. In fact, as indicated in the original Presidential transmittal, existing Federal and State law appears sufficient to implement the Convention; thus, the Convention will not itself provide an independent cause of action in U.S. courts, new Federal legislation would be required only to establish criminal jurisdiction under Article 5(1)(b) over offenses committed by U.S. nationals outside the United States and under Article 5(2) over foreign offenders committing torture abroad who are later found in territory under U.S. jurisdiction.

Seventh, you were puzzled by "an obvious contradiction in the administration's approach to asylum and deportation," in that differing standards apply to those aliens who seek to avoid persecution by claiming asylum in the United States, on the one hand, and those who seek to avoid deportation on the other. The Supreme Court has determined that U.S. law establishes such a distinction. Compare *I.N.S.* v. *Stevic*, 467 U.S. 407 (1984), with *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987). These decisions determined that relevant U.S. law provides a higher standard of proof for those seeking to avoid deportation under section 243(h) of the Immigration and Nationality Act ("clear probability of persecution") than for those seeking asylum under section 208(a) ("well founded fear of persecution"). Article 3 of the Convention places an obligation upon the competent authorities of the United States not to deliver an individual to a country where he would be tortured. This "non-refoulement" obligation is analogous to the statutory prohibition against deportation in section 243(h). The Supreme Court decided in *Stevic* that the applicable standard for evaluating such a claim is "a clear probability of persecution." We hope that on reexamination you will agree that this is the relevant legal standard to be applied under the Convention.

With respect to your final question whether the People's Republic of China is "a violator of human rights, and if so, why has the PRC not been condemned for these violations by the United Nations," we would refer you to the testimony of Ambassador Schifter before the Subcommittee on Human Rights and International Organizations of the House Foreign Affairs Committee on February 21, 1990, concerning the Department's Country Reports on Human Rights Practices for 1989. The annual report for China details the dramatic decline in the human rights climate in China during the past year, including the Beijing massacre and ensuing crackdown.

While you did not raise it, you undoubtedly know that Senator Helms proposed during the hearings that a "sovereignty" reservation should be attached to the Convention conditioning our obligations thereunder on the U.S. Constitution. We are preparing a detailed response to that proposal and will of course share it with you when it has been completed.

I trust the foregoing is responsive to your concerns. We would be pleased to provide further information if you would find it helpful.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

LETTER FROM JANET G. MULLINS, ASSISTANT SECRETARY, LEGISLATIVE AFFAIRS, DEPARTMENT OF STATE, TO SENATOR HELMS

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.
June 13, 1990.

Senator HELMS,
U.S. Senate, Washington, DC.

DEAR SENATOR HELMS: I am writing with regard to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which is currently pending before the Committee on Foreign Relations. At the committee's hearing on January 30, you expressed a number of concerns about the Convention and the administration's proposed package of reservations, declarations, and understandings, and you urged us to consult with your staff on these issues. We have done so and have found the consultations helpful in clarifying a number of issues, one of the most important being the "sovereignty" clause you proposed at the hearing.

The "sovereignty" clause would condition the Senate's advice and consent to ratification of the Convention upon the same proviso which was applied to the Genocide Convention (and subsequently to several other treaties), namely, that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

We agree with that statement as a matter of fact and as a legal proposition. Nothing in this Convention does or could require any unconstitutional action by the United states. To our knowledge, no one—in formal testimony or otherwise—has identified any provision in the Convention that is potentially unconstitutional. (In that regard, the Torture Convention differs from the Genocide Convention, which arguably raised a potential First Amendment issue.) The Constitution is the supreme law of the land; neither a Treaty nor an executive agreement can, in our view, authorize action inconsistent with it. This was unambiguously established by the Supreme Court in *Reid* v. *Covert*, 354 U.S. 1 (1957), and remains true whether or not the Senate conditions its approval of the Convention (or any other Treaty) on a "sovereignty" clause. It was for these reasons that at the January 30 hearing we opposed the "sovereignty" clause as unnecessary.

Although unnecessary at the domestic level, the proposal becomes very damaging at the international level. In the year since we ratified the Genocide Convention subject to a similar "sovereignty" reservation, some twelve foreign governments (all of them European allies) have formally registered their objections to it. The United Kingdom is especially concerned. Other States have protested diplomatically, and have put us on notice that they will coordinate stronger objections if we repeat the reservation in other contexts. These governments have raised legitimate concerns about our reservation. It creates unacceptable uncertainty as to the extent of the legal obligations which the United States has in fact assumed under the Convention. They ask how a foreign country, not expert in the domestic constitution of another country, will know the extent of treaty obligations actually undertaken by a State which subjects its treaty obligations to such a general reservation.

They have also expressed the concern that other countries may follow the U.S. lead in conditioning their acceptance of the Convention upon their own constitutions or internal law. This problem of reciprocity exists even if other States do not attach a similar reservation to the Convention. As a matter of international treaty law, our "constitutional" reservation is reciprocally available to all other treaty partners. Thus, our ability to invoke treaty rights against them would be subject to their Constitutions. The problem is compounded since the reservation attaches to the entire Convention, leaving the overall extent of legal obligations unclear and open to substantial abuse by countries with obscure or readily-changeable constitutions. This could be a particular problem with regard to the Mutual Legal Assistance Treaties, which we intend to overcome foreign bank secrecy laws in order to assist our antinarcotics efforts.

From the international perspective, therefore, the proposed "sovereignty" clause is not harmless but instead threatens to upset the very object and purpose of the Convention, which is the establishment of an effective international legal prohibition against torture.

In the course of our consultations, our staffs discussed a possible accommodation of our respective concerns wherein the "sovereignty" clause would be adopted as a declaration and included in the Senate's resolution of advice and consent but would not be included in the formal instrument of ratification submitted by the United States to the United Nations. The clause would thus have its intended effect domestically, clarifying the issue of U.S. law about which you are concerned, while avoiding the difficulties that trouble us on the international level.

This procedure was followed with respect to a different provision in the Genocide Convention. In that context, the Senate included in its resolution of advice and consent the declaration that the President would not submit the instrument of ratification until implementing legislation had been adopted. It was understood, however, that this declaration would not be incorporated in the instrument of ratification filed with the treaty depositary.

While we believe that inclusion of the provision in the resolution of advice and consent is unnecessary, we would be prepared to accept this outcome as an accommodation of our respective interests.

We are grateful for the time and effort Bob Friedlander has devoted to this issue; the above proposal is due largely to his diligence.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

U.S. DEPARTMENT OF STATE,
WASHINGTON, DC.
July 9, 1990.

Hon. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: I am writing to reiterate the administration's strong interest in early and favorable action by the Senate Foreign Relations Committee concerning the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. We are pleased to note that the committee has scheduled a markup of the resolution of advice and consent to ratification of the Convention on July 11.

As you know, since the committee's hearing on the Convention on January 30, we have continued our consultations with committee staff, as well as the staff of individual members, concerning the proposed package of reservations, declarations, and understandings to the Convention. We have also continued to receive comments on the proposed package from interested private groups.

After careful consideration of the various issues raised, the administration stands by the package we have proposed. We continue to believe that the package is desirable to clarify the Convention and to address certain U.S. domestic legal concerns, and does not undermine our commitment to the Convention. At the same time, we believe that the additional elements which have been proposed are neither necessary nor helpful.

The explanation for the package of reservations, understandings, and declarations we have proposed was provided during the January 30 hearing and further elaborated in an April 4 letter to Senator Pressler (a copy of which was earlier provided to your staff; another is enclosed for your convenience). There are, however, two important issues on which I would like to underscore our position.

The first issue concerns a proposed "constitutional" or "sovereignty" reservation which Senator Helms has indicated he intends to offer. Such a provision would subject the Senate's advice and consent to ratification of the Convention to the same condition that was applied to the Genocide Convention (and subsequently to several other treaties), namely, that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

At the January 30 hearing, the Department's Legal Adviser, Judge Sofaer, stated, the administration's strong opposition to the imposition of such a reservation to the Convention. At the domestic level, it is entirely unnecessary. At the international level, it is very damaging, as it leaves the treaty obligations between the United

States and other States party ambiguous and potentially asymmetrical. we therefore remain strongly opposed to such a condition.

In the year since we ratified the Genocide Convention, twelve European countries have filed written objections to the "sovereignty" reservation in the context of that Convention, and others have raised their concerns in diplomatic channels, 'indicating that they would strongly oppose a similar reservation to the Torture Convention. Moreover, six recently-approved Mutual Legal Assistance Treaties were all subjected to the same "sovereignty" proviso; to date, four of the six governments concerned have reacted negatively.

As these governments note, the reservation makes the extent of U.S. legal obligations under the Convention unclear to our treaty partners, which cannot be expected to understand the scope of the U.S. Constitution. Moreover, under multilateral treaty law, the reservation is automatically available reciprocally to all other States Party, thereby enabling others to limit their compliance with the Torture Convention by invoking the terms of their own constitutions, which may be vague or easily changeable. This leaves the legal relationship between the U.S. and other States Parties unclear, and, because the U.S. Constitution does not permit torture, potentially asymmetrical. Attaching a "sovereignty" reservation to our instrument of ratification thus undermines the Convention's objective of creating an effective international obligation to eliminate torture. One potential effect could be to erode or even eliminate the central obligation to extradite or prosecute torturers.

While damaging at the international level, the reservation is unnecessary at the domestic level. Nothing in this Convention does or could require any unconstitutional action by the United States. To our knowledge, no one—in formal testimony or otherwise—has identified any provision in the Convention that is potentially unconstitutional. (In that regard, the Torture Convention differs from the Genocide Convention, which arguably raised a potential First Amendment issue.) The Constitution is the supreme law of the land; neither a Treaty nor an executive agreement can, in our view, authorize action inconsistent with it. *Reid* v. *Covert*, 354 U.S. 1 (1957). This remains true whet' er or not the Senate conditions its approval of the Convention (or any other Treaty) on a "sovereignty" clause. If there are continuing concerns about the relationship between the Convention and the Constitution, we would suggest that this letter be included in the committee's report as a confirmation of the Executive Branch's agreement that the Convention neither requires nor authorizes action inconsistent with the Constitution.

The second issue involves the Committee Against Torture. On this issue, we have received conflicting advice during our recent consultations. Some groups have urged us to accept the full competence of the committee without reservation. Others have urged us to decline to accept any competence of the committee. After careful consideration, we continue to believe it appropriate to adopt the middle course proposed in our package of reservations and accept two of the three optional competences of the committee: one under Article 20 of the Convention, which empowers the committee to examine country situations when it receives reliable information containing well-founded indications that torture is being systematically practiced, and the other under Article 21, which permits the committee to consider complaints from one State party that another is not fulfilling its obligations under the Convention. We would not, however, propose to accept the third competence of the committee, under Article 22, to consider complaints by individuals subject to U.S. jurisdiction claiming to be victims of a violation of the Convention.

We continue to believe strongly that our substantial interest in eliminating torture around the world will best be served by participating actively in the work of the committee and directing its attention to situations in which torture is still practiced. The committee has, to date, held four sessions, during which it began consideration of initial reports from States Parties on implementation of the Convention as well as communications submitted under Article 22. Obviously, we cannot help shape the committee's direction if we do not participate, and since Article 21 requires reciprocity, we cannot call another Stare's actions into question unless we are also prepared to accept the committee's competence to consider reciprocal claims against us.

We do not believe that the United States has anything to fear from such participation. There is no possibility of a well-founded indication of systematic torture in the United States (to our knowledge, no human rights group has ever accused the U.S. of systematic torture), and we do not believe that States with a political motivation to charge us with torture are likely to expose themselves to reciprocal charges. Moreover, with the changes in Eastern Europe, the risks of politically motivated "bloc voting" are substantially diminished from several years ago. In any event, the committee has no authority to make binding decisions.

We are not inclined to accept the committee's third competence, to hear complaints of individuals subject to our jurisdiction who claim to be victims of a violation of the Convention. Claims submitted against the United States are likely to be frivolous, particularly since the claimant must have first exhausted all available domestic remedies; given the extensive remedies provided by U.S. law, we do not believe there is any need to create an additional international remedy for persons subject to our jurisdiction, nor any justification to commit substantial resources to respond to the claims that would be submitted. Moreover, there could be more serious problems concerning implications for our own domestic proceedings if the committee did not scrupulously respect the exhaustion of remedies rule. we therefore believe it would be prudent to await further committee experience before deciding to accept this third competence of the committee.

The United Kingdom has adopted the same approach to the committee which we are recommending. Other western European States generally accept all of the committee's competences. The Soviet Union and most Eastern European States have rejected the committee's competences under Articles 20–22, but these actions were taken before the recent changes in the political landscape there and may well be reversed in some cases.

We hope that you and the members of your committee will find the foregoing useful in your consideration of the Convention. As always, we stand ready to assist the committee in any way.

Sincerely,

JANET G. MULLINS,
Assistant Secretary, Legislative Affairs.

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